MASSACHUSETTS

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Chairman Stuart Altman, Executive Director David Seltz
Massachusetts Health Policy Commission
50 Milk Street
Boston, MA 02109

Re: Proposed Regulation 958 CMR 10.00 et seq.

Dear Chairman Altman, Honorable Commissioners and Director Seltz:

I offer the following comments on behalf of Blue Cross Blue Shield of Massachusetts ("Blue Cross") concerning the Health Policy Commission's proposed regulation, 958 CMR 10.00 et seq.

Blue Cross strongly supports the cost containment goals of Chapter 224. Specifically, the Performance Improvement Plan process is a critical regulatory tool that will, if carefully drawn, assist in the refinement of cost containment strategies for the mutual benefit of the Commonwealth. We share your commitment to this task and take pride in the fact that Blue Cross' total spending growth has been significantly below the state benchmark for three years in a row:

- 0.7 % for the 2014 reporting period
- 1.3 % for the 2015 period and
- 1.9 % preliminarily last year.

Notably, Chapter 224 was calibrated to recognize that plan and provider leadership is the key for cost-effective and timely improvements. Rather than an agency-driven approach, the statute clearly denotes the market as the mechanism to accomplish these goals. This careful balance is demonstrated many times in the statute. For example, it is evidenced in the interplay of the nature and timing of confidential identification vs. broad public notice. Compare 958 CMR 10.03 with 958 CMR 10.05. Moreover, while the HPC may proscribe the "manner and form" of the PIP, the filing entity alone develops the actual proposal for submission. See 958 CMR 10.09(1) and (2). Likewise, the HPC cannot amend a PIP; it may only approve or disapprove the same. See 958 CMR 10.10.

Especially in light of this balanced statute, important procedural safeguards should be added to the HPC's regulations. For example, the HPC should expressly allow the plan or provider to review any documents and other data, through a time-sensitive discovery process, that the HPC and CHIA reviewed in the course of reaching their conclusions for the requirement of the PIP. Additionally, the plan or provider should be able to test these conclusions through further discussion and examination with

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subject matter experts at both agencies who were instrumental to these determinations. Not only are these procedural due process steps called for under federal and state law[1], they would provide critical value to the party at interest. Information newly understood would illustrate how the HPC reached their conclusions about "significant concerns" and provide needed tools to analyze appropriate next steps prior to the clock ticking on any response. See, e.g., 958 CMR 10.04(1), (2). Such a deliberative approach is contemplated by the HPC itself since their regulations contain their own right to "request additional information" from the plan or provider in order to "evaluate the factors" set forth. See id. at (3).

Blue Cross believes it prudent to add these procedural safeguards now so that any PIP proceeding is not unduly delayed by requests at the time of any actual proceeding.

Thank you for the opportunity to present these comments so that the successful implementation of the Performance Improvement Plan process may continue apace.

Sincerely,

Michael T. Caljouw

[1] Since the HPC's PIP process is incented to "result in meaningful, cost-saving reforms", its fiscal impact on an entity is clear. Additionally, the regulations set forth the imposition of monetary fines in several instances. Thus, there is a strong likelihood that due process deprivation of property concerns will be raised by parties. Moreover, an entity may assert a "liberty" interest in maintaining his or her good name and so official publication of material injurious to that reputation may warrant due process protections. See, e.g., Smith v. Commissioner of Mental Retardation, 409 Mass. 545, 550 (1991). "Due process" as applied to these proceedings has a basic core that applies to these proceedings: (1) notice – the right to be aware of a proceeding, to know the subject of the proceeding, and to have an adequate amount of time to prepare for that proceeding; (2) engagement – the right of an entity to hear the evidence, which includes testimony, offered against him and an opportunity to question witnesses; (3) defense – the right to introduce evidence in support of his position; (4) counsel or authorized representative – the right to have his attorney or other representative assist him; and (5) a fair hearing – the right to have an impartial decision-maker adjudicate the matter or make the decision and provide reasons for that decision. Administrative law expert, the late Professor Cella noted that "if a person has a sufficient constitutionally protected interest in a statutory entitlement, he is owed some measure of procedural due process before he may in any way be deprived of his constitutionally protected interest." 38 Alexander Cella, Massachusetts Practice: Administrative Law and Practice, § 213 at n.23 (1986).